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12 **UNITED STATES DISTRICT COURT**
13 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

14 JOHN JONES, III,

No. CV 10-5480 BHS

15
16 Plaintiff,

**PLAINTIFF'S RESPONSE
TO DEFENDANT'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

17 vs.

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19 BNSF RAILWAY COMPANY, a
20 Delaware corporation,

21 Defendant.
22

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24 **I. INTRODUCTION**

25 In his Complaint, Plaintiff John Jones does not assert a "ballast claim." He
26 simply stated in response to BNSF's interrogatories that "continually walking on
27 uneven terrain to do [his] job" was one of several job duties which contributed to
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30 PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT – 1

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1 his injuries. Mr. Jones elaborated on this topic in his deposition. BNSF ignores
2 Mr. Jones' actual position and substitutes a misrepresented version of his position
3 in its Motion for Partial Summary Judgment ("Motion"). BNSF's strawman
4 argument fails. Mr. Jones' ballast-related contentions¹ are a proper component of
5 his overall FELA claim, and BNSF's Motion seeking exclusion of this testimony
6 should be denied.
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10 II. RELEVANT FACTS

11 Mr. Jones filed his Complaint against BNSF on July 7, 2010, alleging
12 causes of action under the Federal Employers' Liability Act, 51 U.S.C § 51 *et*
13 *seq.* ("FELA"), the Federal Railroad Safety Act of 1994, 49 U.S.C. § 20101 *et*
14 *seq.* ("FRSA"), and the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*²
15 Among other allegations, Mr. Jones alleged³ BNSF breached its statutory duties
16 by:
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- 20 • Failing to exercise due care in providing the Plaintiff with a
21 reasonably safe and healthy work environment;
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25 ¹ This phrase is not, as BNSF will likely argue, a semantic distinction without a difference. Rather, it is
26 consistent with the FELA causation standard in that BNSF "caused or contributed to [Mr. Jones'] injury
27 if [BNSF's] negligence played any part in bringing about the injury." *CSX Transp., Inc. v. McBride*, __
U.S. __, 131 S.Ct. 2630, 2634, 180 L.Ed.2d 637 (2011).

28 ² ECF No. 1 at 3.

29 ³ *Id.* at 6, ¶17.

- Failing to take adequate precautionary steps to protect Plaintiff from reasonably foreseeable dangers associated with his work;
- Failing to provide Plaintiff with adequate in-house safety training to educate him and other workers concerning the insidious, cumulative effects of repetitive stress and how the particulars of Plaintiff's assigned work tasks may be affecting his body;
- Failing to warn Plaintiff of the latent potential health risks and hazards associated with cumulative daily exposures to repetitive stress

Mr. Jones did not assert a "ballast claim" in his Complaint.⁴

In response to an interrogatory propounded by BNSF, Mr. Jones stated the following:

INTERROGATORY NO. 4: Please identify the work environment, work condition(s), machinery, tools, and equipment, including seat(s), which you claim to have caused your alleged injuries to your body as alleged in the Complaint, and if you claim that BNSF failed to maintain or make safe said work conditions or equipment, please describe that condition or equipment, name the person(s) responsible for said maintenance or safety, how the alleged lack of maintenance or safety caused your alleged injury or injuries, and what condition or equipment, including seat(s), you contend should have been implemented or provided during your employment.

ANSWER:

⁴ See ECF No. 1.

1 During my employment with BNSF, I was subject to work
2 daily in conditions such as [...] (C) Continually walking on
3 uneven terrain to do my job⁵
4 When BNSF's counsel inquired briefly into this area during Mr. Jones'
5 deposition, Mr. Jones confirmed that mainline ballast on which he walked during
6 his career was a contributing factor of his injuries.⁶

7 BNSF now brings this Motion to dismiss the ostensible "ballast claim" it
8 perceives is expressed through Mr. Jones' discovery responses.
9

10 III. AUTHORITY & ARGUMENT

11 A. Summary judgment standard

12 Under Fed. R. Civ. P. ("FRCP") 56, a party is entitled to summary
13 judgment where the documentary evidence produced by the parties permits only
14 one conclusion.⁷ Summary judgment is precluded if there exists a genuine
15 dispute over a fact that might affect the outcome of the suit under the governing
16 law.⁸
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25 ⁵ Declaration of Jerry P. Scharosch, Ex. A, filed herewith.

26 ⁶ See ECF No. 33-1 at 3-5 (Ex. A to the Declaration Kelsey Endres.)

27 ⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Semegen*
28 *v. Weidner*, 780 F.2d 727, 732 (9th Cir.1985).

29 ⁸ *Anderson*, 477 U.S. at 248.

1 The moving party has the initial burden to prove that no genuine issue of
2 material fact exists.⁹ The party opposing summary judgment must go beyond the
3 pleadings to designate specific facts establishing a genuine issue for trial.¹⁰ In
4 ruling on a motion for summary judgment, all inferences drawn from the
5 underlying facts must be viewed in the light most favorable to the nonmovant.¹¹
6

7
8 **B. Sufficient evidence exists to establish a prima facie case of negligence**
9 **related to Plaintiff's ballast-related contentions, or at least to establish**
10 **the existence a genuine dispute of material fact, precluding summary**
11 **judgment.**

12 Under the FELA, a railroad employer owes its employees a duty to
13 provide a reasonably safe place to work.¹² A railroad breaches this duty when it
14 fails to use ordinary care under the circumstances or fails to do what a reasonably
15 prudent person would have done under the circumstances to make the working
16 environment safe.¹³ In other words, "a railroad breaches its duty when it knew, or
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23 ⁹ *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d
24 538 (1986).

25 ¹⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

26 ¹¹ *Matsushita*, 475 U.S. at 587.

27 ¹² *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600, 601, 65 S.Ct. 545, 89 L.Ed. 490 (1945); *Atchison, T.*
28 *& S.F. Railway Co. v. Buell*, 480 U.S. 557, 558, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987).

29 ¹³ *Tiller v. Atlantic C.L.R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943).

1 by the exercise of due care should have known that the prevalent standards at use
2 were inadequate to protect the plaintiff and similarly situated employees."¹⁴
3

4 Although Mr. Jones still bears the burden of proving negligence, which
5 involves a violation of the duty of ordinary care, "courts have held that only
6 'slight' or 'minimal' evidence is needed to raise a jury question of negligence
7 under FELA."¹⁵ Here, Mr. Jones' ballast-related allegations are merely one
8 component of his overall claim and meet the standard of "slight evidence" of
9 BNSF's negligence. A jury question exists regarding this issue, and summary
10 judgment is improper.
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14 During his entire career, Mr. Jones did not receive any training or
15 education from BNSF regarding the effects that walking on ballast could have on
16 his body.¹⁶ Nor did BNSF provide any training or education to Mr. Jones on
17 how to properly walk on mainline ballast to avoid or lessen the likelihood of
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23 ¹⁴ *Balsley v. BNSF Railway Co.*, 2010 WL 4857284, *4 (W.D. Wash. 2010); *Van Gorder v. Grand*
24 *Trunk Western R.R., Inc.*, 509 F.3d 265, 269–70 (6th Cir.2007); *Urie v. Thompson*, 337 U.S. 163, 178,
25 69 S.Ct. 1018, 93 L.Ed. 1282 (1949).

26 ¹⁵ *Koch v. Burlington Northern & Santa Fe Ry. Co.*, 2006 WL 3404828 (W.D. Wash. 2006) (quoting
27 *Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d 631, 632 (9th Cir.1984)); *CSX Transp., Inc. v.*
28 *McBride*, __ U.S. __, 131 S.Ct. 2630, 2634, 180 L.Ed.2d 637 (2011) ("a defendant railroad caused or
contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about
the injury").

29 ¹⁶ Declaration of John Jones, III at ¶3, filed herewith.

1 being injured while performing this job task.¹⁷ BNSF, however, was not
2 unaware of the dangers mainline ballast presented to its employees.

3
4 In 1998 BNSF produced a video, entitled "Walking Safely on Ballast."¹⁸
5 The video contains several useful tips on preventing ballast-related injury,
6 including:¹⁹

- 7 • that injuries can occur when walking on ballast;
- 8
- 9 • that walking on ballast involves danger and there are ways
- 10 to avoid or lessen the impact of these dangers;
- 11
- 12 • sloping ballast and mainline ballast constitute special
- 13 conditions requiring extra attention;
- 14
- 15 • that ballast increases the likelihood of losing one's footing
- 16 and falling;
- 17
- 18 • that it is "hazardous" to walk and work on sloping ballast;
- 19
- 20 • that walking on mainline ballast requires "extra caution";
- 21
- 22 • that mainline ballast makes it easier to slip or trip; and
- 23
- 24 • that "whenever possible, the best course is not to walk on
- 25 ballast at all."

26 ¹⁷ *Id.* at ¶¶4-5.

27 ¹⁸ Declaration of Jerry P. Scharosch, Exs. B & C.

28 ¹⁹ Declaration of Jerry P. Scharosch, Ex. C.

1 Mr. Jones was never given an opportunity to watch that video while
2 employed by BNSF.²⁰ By failing to give Mr. Jones an opportunity to view this
3 video, BNSF denied Mr. Jones the opportunity to incorporate the ballast safety
4 information and procedures into his work processes. BNSF's failure to provide
5 that safety information to Mr. Jones during his employment raises an issue of
6 fact regarding BNSF's conduct and the FELA standard of care. Mr. Jones has
7 established a prima facie case of negligence vis-à-vis his ballast-related
8 contentions.
9

10 In its Motion, BNSF highlights (1) that Mr. Jones is ignorant of the
11 Federal Railway Administration's regulations on ballast; and (2) that Mr. Jones
12 could not identify any debris or defect in the ballast itself.²¹ However, the
13 ignorance of Mr. Jones or the material/technical purity of the ballast itself do not
14 affect BNSF's duty or breach on the question of whether BNSF provided its
15 employees such as Mr. Jones a reasonably safe working environment on the
16 ballast near railroad tracks. That "environment" includes safety training. Neither
17 of BNSF's contentions establish the absence of a genuine dispute of material fact,
18 as BNSF appears to imply.
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28 ²⁰ Declaration of John Jones, III at ¶5, filed herewith.

29 ²¹ See ECF No. 32 at2.

Moreover, given that the video was produced by BNSF in 1998, it follows that the ballast-related safety tips either existed within BNSF's institutional knowledge, or should have existed by the exercise of due care, well before that point. Yet BNSF did not make this video available to Mr. Jones or train him accordingly. At the very least, a genuine dispute of material fact exists regarding BNSF's negligence in this regard. This issue is "best left for the province of the jury."²² Insofar as BNSF's partial summary judgment motion is directed toward the absence of negligence, it should be denied.

C. The FRSA does not preclude Mr. Jones' ballast-related contentions.

As authority for its proposition that the FRSA precludes Mr. Jones' ballast-related contentions, BNSF cites 49 C.F.R. §213.103 and the Sixth Circuit's presumed "seminal ballast/preclusion case" of *Nickels v. Grand Trunk Western R.R., Inc.*, 560 F.3d 426 (6th Cir. 2009). BNSF's reliance on both authorities is misplaced.

49 C.F.R. §213.103 is the FRA's regulation relating to ballast. For the FRSA's regulation to preempt an action, a party "must establish more than that they 'touch upon' or 'relate to' that subject matter, and must show that 'the federal

²² *Balsley*, 2010 WL 4857284, *4 (denying BNSF's summary judgment on the issue of negligence under FELA in a claim involving mainline ballast).

1 regulations substantially subsume the subject matter' " of the claim.²³ Regulation
2 §213.103 "substantially subsumes the issue of ballast size."²⁴
3

4 However, the Ninth Circuit has interpreted the scope of §213.103 as
5 "designed to insure that tracks have adequate support," not to "address[] the
6 concern that employees have a safe working environment near railroad tracks."²⁵
7 Other federal courts have also recognized the limited scope of §213.103.²⁶
8
9 Because the Ninth Circuit has directly articulated the limited scope of §213.103,
10 the regulation does not support BNSF's theory that Mr. Jones' ballast-related
11 contentions are precluded by the FRSA.²⁷
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14 Similarly, BNSF's reliance on the "seminal" *Nickels* case is misplaced.
15
16 Mr. Jones cannot understand why BNSF deems *Nickels* a watershed case when
17 the primary issue in the case was decided on particularly narrow grounds.
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19 ²³ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)
20 (citation omitted).

21 ²⁴ *Nickels v. Grand Trunk Western R.R., Inc.*, 560 F.3d 426, 431 (6th Cir. 2009).

22 ²⁵ *Southern Pacific Transp. Co. v. Public Utilities Com'n of State of Cal.*, 647 F. Supp. 1220, 1225
23 (N.D. Cal. 1986), *aff'd* 820 F.2d 1111 (9th Cir. 1987).

24 ²⁶ *Allenbaugh v. BNSF Ry. Co.*, 2011 WL 2182430 (E.D. Wash. 2011) (recognizing the binding effect
25 of *S.P. Transp. Co.* in the Ninth Circuit); *Abromeit v. Montana Rail Link, Inc.*, 2010 WL 3724425 (D.
26 Mont. 2010) (same); *Davis v. Union Pacific R. Co.*, 598 F.Supp.2d 955, 958 (E.D. Ark. 2009) ("Almost
27 every court has concluded that 'the FRSA is silent on the question of walkways. The regulations are
directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees who must
inspect the trains.' ")

28 ²⁷ *See Allenbaugh v. BNSF Ry. Co.*, 2011 WL 2182430 (E.D. Wash. 2011) (rejecting BNSF's claim of
29 preclusion under FRSA and 49 C.F.R. §213.103 regarding plaintiff's ballast claim).

1 *Nickels* involved two plaintiffs who alleged their railroad employer breached its
2 FELA duties to provide a safe working environment "by using large mainline
3 ballast – instead of smaller yard ballast – underneath and adjacent to tracks
4 receiving heavy foot traffic."²⁸ As stated above, the *Nickels* court interpreted
5 §213.103 as "substantially subsum[ing] the issue of ballast size."²⁹ The court
6 held that the FRSA and its accompanying regulation, 49 C.F.R. §213, precluded
7 the plaintiffs' FELA ballast claims because the claims were based exclusively on
8 ballast size.³⁰

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10 Here, however, the issue is markedly different. Unlike the plaintiffs in
11 *Nickels*, Mr. Jones' ballast-related contentions are not directed toward the *size* of
12 the ballast material. Rather, Mr. Jones' contentions revolve around BNSF's
13 breach of its duty to adequately train him regarding the danger of physical
14 injuries which could arise from working and walking on mainline ballast. Unlike
15 the Sixth Circuit in *Nickels*, the Ninth Circuit has articulated a limited scope of
16 §213.103.³¹ The narrow holding of *Nickels* does not warrant the "seminal" status

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25 ²⁸ *Nickels v. Grand Trunk Western R.R., Inc.*, 560 F.3d 426, 428 (6th Cir. 2009).

26 ²⁹ *Id.* at 431.

27 ³⁰ *Id.* at 433.

28 ³¹ *Southern Pacific Transp. Co. v. Public Utilities Com'n of State of Cal.*, 647 F. Supp. 1220, 1225
29 (N.D. Cal. 1986), *aff'd* 820 F.2d 1111 (9th Cir. 1987).

1 BNSF ascribes to it. The plaintiffs' claim in *Nickels* is distinguishable from the
2 facts and claims in this case and therefore *Nickels* does not support BNSF's
3 theory that Mr. Jones' ballast-related contentions are precluded by the FRSA.
4 The facts of Mr. Jones' claims against BNSF include ballast training and not
5 ballast size. Summary judgment on this point is improper.
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8 **D. The ICCTA does not affect Mr. Jones' ballast-related contentions.**
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10 The ICCTA, 49 U.S.C. § 10501, *et seq.*, confers on the Surface
11 Transportation Board ("STB") the authority to regulate –
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13 (b) (1) transportation by rail carriers, and the remedies
14 provided in this part with respect to rates, classifications,
15 rules (including car service, interchange, and other operating
16 rules), practices, routes, services, and facilities of such
17 carriers; and

18 (2) the construction, acquisition, operation, abandonment, or
19 discontinuance of spur, industrial, team, switching, or side
20 tracks, or facilities, even if the tracks are located, or intended
21 to be located, entirely in one State ...³²

22 The ICCTA also contains a pre-emption clause which provides that "[e]xcept as
23 otherwise provided in this part, the remedies provided under this part with
24 respect to regulation of rail transportation are exclusive and preempt the
25 remedies provided under Federal or State law."³³
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³² 49 U.S.C. § 10501(b).

29 ³³ *Id.*

1 BNSF made an identical argument regarding ICCTA preclusion of a
2 plaintiff's ballast-related FELA claim in *Balsley v. BNSF Railway Co.*, 2010 WL
3 4857284, *4 (W.D. Wash. 2010). In *Balsley*, Judge Robert J. Bryan rejected
4 BNSF's ICCTA argument, stating:
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7 BNSF's argument (that a FELA negligence claim that
8 impacts railroad operations is precluded by ICCTA) is not
9 persuasive. Taken to its logical conclusion, BNSF's
10 argument would prevent nearly any type of recovery under
11 the FELA for negligence, because holding a defendant liable
12 in a negligence action is designed, in part, to persuade the
13 defendant to modify its behavior or operations. There is no
14 evidence to suggest that precluding recovery under FELA
15 was the intent of the ICCTA. As a result, BNSF is not
16 entitled to summary judgment on this issue.³⁴

17 This analysis applies with equal force here.³⁵

18 BNSF also appears to misunderstand the effect of a court's decision on
19 summary judgment. BNSF argues that "[d]etermining that working on ballast is
20 impermissible would severely impact BNSF's mainline operations" and that
21 "holding as a matter of law that walking on ballast is negligent will require
22 BNSF to stop all of its employees from working on mainline [...] ballast."³⁶
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26 ³⁴ *Balsley*, 2010 WL 4857284 at *6.

27 ³⁵ See also *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (ICCTA did not preclude the plaintiff's
28 FELA claim).

29 ³⁶ ECF No. 32 at 19, 21.

1 "The function of the district court in considering the motion for summary
2 judgment is not to resolve disputed questions of fact but only to determine
3 whether, as to any material issue, a genuine factual dispute exists."³⁷
4 Additionally, "[a] district court does not, of course, make 'findings of fact' in
5 ruling on a summary judgment motion."³⁸ If this court determines a genuine
6 dispute of material fact exists regarding Mr. Jones' ballast-related contentions,
7 then summary judgment is improper on this point.³⁹ Denying BNSF's summary
8 judgment motion on the ICCTA issue will not engender the operational
9 catastrophe envisioned by BNSF – only trial will result.⁴⁰ BNSF's motion for
10 summary judgment based on the ICCTA is unsupported and unsupportable; thus,
11 it should be denied.
12

13 IV. CONCLUSION

14 BNSF has invented a strawman which it seeks to discredit and dismiss
15 from Mr. Jones' lawsuit – an ostensible "ballast claim." Mr. Jones does not
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17 ³⁷ *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 326 (2nd Cir. 2011).

18 ³⁸ *Rand v. Rowland*, 154 F.3d 952, 957 n. 4 (9th Cir. 1998).

19 ³⁹ FRCP 56(a).

20 ⁴⁰ Although trial has been described as a "crucible," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 575,
21 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (Stevens, J. dissenting), it surely does not intimidate BNSF.
22 *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149
23 (9th Cir. 2005) (BNSF "is a sophisticated corporate litigant and a repeat player in ... lawsuits").

1 assert such a claim in his Complaint. In two passing references in response to
2 BNSF's discovery requests, Mr. Jones referenced how walking on ballast is one
3 of the factors which has contributed to his injury. These ballast-related
4 contentions do not represent a distinct cause of action; rather, they are part of
5 larger FELA umbrella under which Mr. Jones asserts that BNSF has failed to
6 provide him with a safe place to work in part due to inadequate training and
7 education. BNSF's motion for summary judgment is contrary to the facts and
8 clear case law interpreting FELA. Because a genuine dispute of material fact
9 exists regarding whether Mr. Jones' work on ballast contributed to his injury and
10 whether BNSF breached its duty in relation to this issue, summary judgment is
11 improper. Mr. Jones respectfully requests that this Court DENY BNSF's Motion
12 for Partial Summary Judgment.
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19 Dated this 7th day of November, 2011.

20 EVANS, CRAVEN & LACKIE, P.S.
21

22 */s/ Patrick M. Risken*

23 By: _____

24 PATRICK M. RISKEN, WSBA #14632

25 JERRY P. SCHAROSCH, WSBA #39393

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30 PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT – 15

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5 CERTIFICATE OF SERVICE
6

7 I hereby certify that on the 7th day of November, 2011, I electronically
8 filed the foregoing with the Clerk of the Court using CM/ECF System, which
9 will send notification of such filing to the following:

10 Tom Montgomery via tom@montgomeryscarp.com
11 Kelsey Endres via kelsey@montgomeryscarp.com
12 Debra Dickerson via debra@montgomeryscarp.com
13 Jeremy Rogers via Jeremy@montgomeryscarp.com
14

15 I hereby further certify that I have caused to be served a true and correct
16 copy of the foregoing document(s) on the non-CM/ECF participants as indicated:

17 *No manual recipients*
18

17 _____ Hand Delivered
18 _____ U.S. Mail
19 _____ Overnight Mail
20 _____ Facsimile

21 */s/ Patrick M. Risken*
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